Supreme Court, U. S.
FILED
FEB 13 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Case No. 79-1259

RICHARD TORCH,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

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OCTOBER TERM, 1979

Case No. _____

RICHARD TORCH,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case. That judgment affirmed petitioner's conviction on each of a five-count indictment for transporting obscene materials in interstate commerce for the purpose of sale, in violation of 18 U.S.C. Section 1465.

Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit, not yet reported, is set forth in the Appendix, *infra,* pp. A 3-A 12. The unreported opinion of the district court is set forth in the Appendix, *infra,* pp. A 13-A 17.

Jurisdiction

The opinion of the Court of Appeals affirming petitioner's conviction was filed on November 23, 1979. The Court of Appeals denied the petitioner's application for rehearing on January 4, 1980. Appendix, *infra*, pp. A 1-A 2.

This petition seeks review of the judgment of a United States Court of Appeals in a criminal case. This Court has jurisdiction to grant this petition under 28 U.S.C. §1254(1).

Questions Presented for Review

I.

Is a search warrant authorizing the seizure of records relating to the interstate transportation of lewd, lascivious and filthy films, together with copies of lewd, lascivious and filthy films and magazines unlawful under the First and Fourth Amendments?

II.

May a search warrant found by a court to be an unlawful general warrant, nevertheless, be upheld in part on the ground that it describes with adequate particularity one category of property subject to seizure under it?

Constitutional Provisions and Statute Involved

The First Amendment provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 18, U.S.C. Section 1465 provides:

> "Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.
>
> "The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described

above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

"When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest."

Statement of the Case

On February 16, 1977, a federal grand jury sitting in the Southern District of West Virginia returned an indictment charging the petitioner, in five counts, with having transported, on the previous day, obscene films in interstate commerce for the purpose of sale and distribution. Each of the five counts alleged that the defendant had transported a particular film from Pittsburgh, Pennsylvania to Charleston, West Virginia. At the time of the alleged offense, neither Pennsylvania nor West Virginia had obscenity laws affecting consenting adults.

The petitioner went to trial on these charges in July, 1977, in the United States District Court for the Southern District of West Virginia. He was convicted on all five counts and was .sentenced to prison for three years on each of the five counts, with the sentences to run concurrently. Execution of thirty months of the thirty-six month sentence was suspended. The

district court ordered that the petitioner be placed on probation for thirty months following service by him of his sentence of six months imprisonment, during which period the petitioner would be required to perform services for an appropriate social organization one-half day per week. In addition, the petitioner was fined $500.

At the petitioner's trial, evidence seized from his person, from his motel room and from his truck was offered and received. The seizure of this evidence occurred on February 16, 1977, when agents of the Federal Bureau of Investigation executed two search warrants, one authorizing a search of the petitioner and the other authorizing a search of his truck. Both of the warrants authorized a search for and seizure of

"records, documents, and writings relating to the transportation, sale and distribution in interstate commerce of lewd, lascivious and filthy films, including route book, billing invoices, cash sale slips, credit memos, and other similar type documents, together with copies of lewd, lascivious, and filthy films and magazines, including a film labeled 'Dog Fucker'."

In the district court, the petitioner moved to suppress the evidence seized under these warrants on the ground that the searches and seizures had violated his First and Fourth Amendment rights. The district court ruled that the warrants were general, overbroad and unlawful insofar as they authorized the seizure of "lewd, lascivious, and filthy films and magazines." Accordingly, that court suppressed the seized films and

magazines, except for the single film which had been specifically identified in the warrant. The district court ruled, however, that the warrants' authorization to seize "records, documents and writings relating to the transportation, sale and distribution in interstate commerce of lewd, lascivious and filthy films . . ." was adequately specific to satisfy the Fourth Amendment. On that basis, the district court refused to suppress those items and they were, accordingly, admitted into evidence.

On appeal to the Court of Appeals for the Fourth Circuit, the petitioner renewed his argument that all evidence obtained under the two warrants should have been suppressed. The court of appeals rejected petitioner's argument, however, affirmed his conviction and denied his petition for rehearing.

REASONS FOR GRANTING THE WRIT

I.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER A SEARCH WARRANT AUTHORIZING THE SEIZURE OF BUSINESS RECORDS RELATING TO LEWD, LASCIVIOUS AND FILTHY FILMS TOGETHER WITH COPIES OF SUCH UNNAMED FILMS CONSTITUTES AN UNLAWFUL GENERAL WARRANT.

On February 16, 1977, two search warrants were executed by agents of the Federal Bureau of Investigation. One warrant authorized a search of the petitioner's person and the other authorized a search of his truck. Both of the warrants authorized a search for and seizure of

> "records, documents, and writings relating to the transportation, sale and distribution in interstate commerce of lewd, lascivious and filthy films, including route book, billing invoices, cash sale slips, credit memos, and other similar type documents, together with copies of lewd, lascivious, and filthy films and magazines, including a film labeled 'Dog Fucker'."

Armed with the two search warrants, agents of the F.B.I. searched the petitioner, his motel room and his truck and seized numerous business documents and records, money, films, magazines and, indeed, the petitioner's truck itself.

In the district court, the petitioner moved to suppress all evidence seized under these two warrants on the ground that the searches and seizures had violated his First and Fourth Amendment rights. The District Court concluded that the authorization contained in the warrants to seize "lewd, lascivious, and filthy films and magazines" was overbroad and general, in violation of the Fourth Amendment. That court, therefore, suppressed all films and magazines, except the one film specifically identified in the warrants, which had been seized. The district court determined, however, that the authorization contained in the warrants to seize "records, documents and writings relating to the transportation, sale and distribution in interstate commerce of lewd, lascivious and filthy films . . ." was sufficiently particular to meet constitutional requirements. Accordingly, the district court refused to suppress any of the records and other items seized. Those items were, therefore, admitted into evidence at petitioner's trial.

On petitioner's appeal of his conviction to the Court of Appeals for the Fourth Circuit, that court affirmed the district court's ruling. The court of appeals acknowledged that this Court's decisions have clearly established the principle that the Fourth Amendment does not countenance a warrant for the seizure of obscene materials which leaves it to the discretion of the executing officers to determine what items are obscene. *See Lo-Ji Sales, Inc. v. New York,* ___ U.S. ___, 99 S.Ct. 2319 (1979); *Roaden v. Kentucky,* 413 U.S. 496 (1973); *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636 (1968); *Marcus v. Search Warrants,* 367 U.S. 643 (1961). The court below concluded, however, that the Fourth Amendment *does* permit a warrant which leaves it to the discretion of the executing officers to determine what items are obscene for the purpose of searching for and seizing records and documents which relate to the transportation in interstate commerce of those items determined by the executing officers to be obscene. An important question is, therefore, presented by this case as to the constitutional validity of a warrant which confers unbridled discretion upon the executing officers to seize any records which relate to any film which, in their opinion (based solely upon an inspection of the box in which the film is contained) is lewd, lascivious or filthy.

The petitioner submits that the distinction drawn in the courts below between the particularity required in a warrant for the seizure of allegedly lewd materials and that which is required in a warrant for the seizure of records relating to allegedly lewd materials is an illogical one and unsupported by this Court's decisions. If a law enforcement officer is unqualified under the Fourth Amendment to determine for himself what materials are obscene and subject to seizure, he is in no better position to decide for himself what records are subject to seizure for being related to unidentified obscene materials. In both cases, the law enforcement officer and not the magistrate, is the person who is deciding both the question of probable cause and the question of what items to seize. And in both cases, the law enforcement officer must resolve those questions on the basis of his own notions of what materials are and are not lewd, lascivious and filthy. The Fourth Amendment, however, requires a neutral and detached magistrate to decide these questions. *Lo-Ji Sales, Inc. v. New York, supra; Anderson v. Maryland,* 427 U.S. 463 (1976); *Stanford v. Texas,* 379 U.S. 476 (1965); *Marron v. United States,* 275 U.S. 192 (1927). In the context of the warrants at issue in this case, the distinction drawn by the courts below simply does not withstand logical analysis.

Furthermore, even if, as an abstract matter, the Fourth Amendment requires greater particularity in a warrant for tne seizure of obscene materials than it does in a warrant for the seizure of business records documenting the transportation in interstate commerce of obscene materials, the warrants at issue here would not satisfy even such a lesser standard of particularity. Indeed, in this case, the warrant did not even include the legal term "obscene". Here, the executing officers were given unfettered discretion to seize any documents which related to the interstate transportation of "lewd, lascivious and filthy films." At the suppression hearing, the principal executing officer conceded that he had no idea what "lewd and lascivious" even means. Transcript 27-28. The petitioner submits that the courts below approved what was nothing less than a

general warrant to engage in a general search and to seize anything which the executing officers, in the exercise of unbridled discretion, wanted to seize. The decisions below raise important questions which ought to be settled by this Court. Accordingly, certiorari should be granted.

II.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER A SEARCH WARRANT FOUND BY A COURT TO BE AN UNLAWFUL GENERAL WARRANT MAY, NEVERTHELESS, BE UPHELD IN PART ON THE GROUND THAT IT DESCRIBES WITH ADEQUATE PARTICULARITY ONE CATEGORY OF PROPERTY SUBJECT TO SEIZURE UNDER IT.

Both courts below concluded that the search warrants authorizing searches of the petitioner's person and of his truck for lewd, lascivious and filthy films and magazines and for records relating to the interstate transportation of such films were unlawful general warrants insofar as they authorized the seizure of films and magazines. Both courts declined to rule, however, that the search warrants were, thereby, rendered invalid. Rather, the courts below concluded that the language in the warrants authorizing the seizure of films and magazines could be severed from the language authorizing the seizure of records and that the warrants could be upheld, in part, on the ground that the description of records to be seized was constitutionally adequate. An important question is, therefore, presented by the decisions below as to whether a general warrant authorizing a general search for inadequately described materials may, nevertheless, be upheld in part because it includes language authorizing

the seizure of certain items which are described with adequate specificity.*

The Fourth Amendment promises in no uncertain terms that "... *no* warrants shall *issue* but upon probable cause ... and particularly describing the place to be searched, and the persons or things to be seized." (Emphasis added). Both courts below concluded that, in the present case, two warrants did, in fact, issue which failed to describe particularly what items could be seized. Nevertheless, the lower courts upheld the warrants in part, because, in their view, it included language adequately describing some of the items to be seized. It is respectfully submitted that the decisions of the courts below evidence a basic misconception about the principal purpose to be served by the particularity requirements of the Fourth Amendment.

The most important function served by the particularity requirement of that Amendment is to make general searches impossible. As this Court stated in *Andreson v. Maryland,* 427 U.S. 463, 480 (1976):

> "General warrants of course, are prohibited by the Fourth Amendment. '[T]he problem [posed by the general warrant] is not that of intrusion *per se,* but of a general, exploratory rummaging in a person's belongings. ... [The Fourth Amendment addresses the problem] by requiring a "particular description" of the

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* For the reasons set forth above under section I, the petitioner steadfastly maintains that the description of records to be seized was insufficient to satisfy the Fourth Amendment. In this section II, the petitioner, without retreating in any way from that position, assumes solely *arguendo* that the description of records to be seized was, standing alone, constitutionally adequate.

> things to be seized.' *Coolidge v. New Hampshire,* 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed. 2d 564 (1971). This requirement '"makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant".' *Stanford v. Texas,* 379 U.S. 476, 485, 85 S.Ct. 506, 512, 13 L.Ed. 2d 431 (1965), quoting *Marron v. United States,* 275 U.S., at 196, 48 S.Ct. at 76.

When a general warrant issues, therefore, it cannot be saved, even in part, by its inclusion of language which, standing alone, describes one category of property to be seized with sufficient particularity. The search itself is conducted under authority of the *entire* warrant. And a search warrant which authorizes the kind of general and exploratory rummaging which the Fourth Amendment was designed to prohibit cannot be saved by the fact that it *also* authorizes the kind of narrow search which, if undertaken alone, might comport with the Fourth Amendment. If the particularity requirement of the Fourth Amendment is to serve its important function of making general searches impossible, then the validity of a warrant must be tested by considering the language of the warrant in its entirety. If it is determined, as it was by the courts below in this case, that the warrant authorizes a general search, then the entire warrant should be condemned and all evidence seized under it suppressed. The failure of the lower courts to reach such a result raises important questions which ought to be considered by this Court. Certiorari should, accordingly, be granted.

CONCLUSION

For the foregoing reasons, petitioner respectfully urges this Court to grant the writ of certiorari and accept this case for review.

Respectfully submitted,

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Order of the Fourth Circuit Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-2299

UNITED STATES OF AMERICA,

Appellee,

versus

RICHARD TORCH,

Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Dennis R. Knapp, District Judge.

Upon consideration of the appellant's petition for rehearing or, in the alternative, to stay the mandate and continuance of bail pending certiorari, by counsel,

IT IS ORDERED THAT:

1. the petition for rehearing is denied.

2. the stay of the mandate is granted and bail is continued pending certiorari.

Entered at the direction of Judge Phillips with the concurrence of Judge Butzner and Judge Hall.

FOR THE COURT—BY DIRECTION

/s/ William K. Slate, II

CLERK

FILED, Jan. 1, 1980, WILLIAM K. SLATE, II, Clerk

Opinion Rendered by the Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-2299

UNITED STATES OF AMERICA,

Appellee,

versus

RICHARD TORCH,

Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Dennis R. Knapp, District Judge.

Argued August 20, 1979 Decided November 23, 1979

Before

BUTZNER, HALL and PHILLIPS, *Circuit Judges.*

Burton W. Sandler for Appellant; James S. Arnold, Assistant Attorney General (Robert B. King, United States Attorney on brief) for Appellee.

PHILLIPS, *Circuit Judge*:

Richard A. Torch appeals his conviction under 18 U.S.C. §1465 for transporting obscene materials in interstate commerce for the purpose of sale. Torch was

convicted on five counts, one for each of five films found by a jury to be obscene. On appeal he assigns Fourth Amendment and other errors. We affirm.

Torch was employed as a salesman by Majestic News Company. Located in Pittsburgh, Pennsylvania, Majestic was engaged in the business of supplying sexually explicit materials to retail outlets. One such outlet was Kip's Discount in Charleston, West Virginia. On February 11, 1977, Torch telephoned the owner of Kip's Discount, Clifford J. Holdren, Jr., to discuss possible purchases from Majestic. Telephone records show that the call was made from the Majestic warehouse in Pittsburgh. Holdren expressed an interest in purchasing a film entitled "Dog Fucker."

On February 15, 1977, Torch appeared at Kip's Discount and delivered two cardboard cartons to Holdren. Holdren paid Torch for the purchase by check, and Torch prepared an invoice reflecting the sale. Shortly after Torch left, Holdren allowed a special agent of the Federal Bureau of Investigation, Robert Sylvester, to examine the contents of the cartons. The cartons contained sexually explicit magazines and films, including the film "Dog Fucker."

With Holdren's consent, Sylvester took copies of these magazines and films to a federal magistrate. The magistrate viewed certain of the magazines and films and determined that there was probable cause to believe they were obscene. The next day, February 16, the magistrate issued warrants for the search of Torch's person and for the search of his van. These provided for the seizure of

> records, documents, and writings related to the transportation, sale and distribution in in-

> terstate commerce of lewd, lascivious and filthy films, including route book, billing invoices, cash sales slips, credit memos, and other similar type documents, together with copies of lewd, lascivious, and filthy films and magazines, including a film labeled "Dog Fucker."

These warrants were executed that day, as was a warrant for search of the Majestic warehouse in Pittsburgh. On suppression motions, the district court suppressed some but not all of the materials seized in the search of Torch and his van, and denied Torch's standing to challenge the warehouse search.

Torch raises several arguments on appeal. The only ones to which we need devote discussion are that all the evidence seized in these searches should have been suppressed, and that the evidence adduced on trial was insufficient to support the conviction on the critical element of interstate transportation.

I.

Torch argues that the warrants authorizing the search of his person and of his van did not set forth with sufficient particularity the things to be seized, rendering them constitutionally impermissible as general warrants.

The requirement set forth in the Fourth Amendment that things to be seized be particularly described is to prevent "a general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire,* 403 U.S. 443, 467 (1971). This is accomplished by removing from the officer executing the warrant all discre-

tion as to what is to be seized. As Torch correctly points out, the particularity requirement is even more stringent where the things to be seized have the presumptive protection of the First Amendment: "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas they contain." *Stanford v. Texas,* 379 U.S. 476, 485 (1965). A warrant may not simply direct the officers to seize "obscene" materials, leaving it to the officers to decide what is "obscene" and what is not. *Lo-Ji Sales, Inc. v. New York,* ___ U.S. ___, 99 S.Ct. 2319 (1979); *Marcus v. Search Warrant,* 367 U.S. 717 (1961); *See also Heller v. New York,* 413 U.S. 483 (1973); *Roaden v. Kentucky,* 413 U.S. 496 (1973).

Torch has largely won this argument already, however. The district court held that the warrants authorized the seizure of "two different kinds of property: (1) business records kept by Torch and Majestic News Company pertaining to the transportation of allegedly obscene materials; and (2) the allegedly obscene materials themselves." The district court found the warrants invalid as to the films and magazines themselves, except the film "Dog Fucker," which was particularly named, but found the warrants valid as to the business records.

Torch argues that the same standard for judging the validity of the warrants as to the films and magazines should have applied to the business records. Specifically, his argument is that

> [h]aving reached the conclusion that the officers could not make an ad hoc determination of the obscenity vel non of the publications, it logically follows that the officers were no better able to make a determination as to what "written material and records" would show the transportation of obscene material in interstate commerce.

We do not agree that this follows as the night the day. The Supreme Court in *Stanford,* 379 U.S. 476, was careful to limit its holding there to materials under the presumptive protection of the First Amendment:

> The word "books" in the context of a phrase like "books and records" has, of course, a quite different meaning. A "book" which is no more than a ledger of an unlawful enterprise thus might stand on a quite different constitutional footing from the books involved in the present case.

Id. at 485 n.16.

The Ninth Circuit in *United States v. Jacobs,* 513 F.2d 564 (9th Cir. 1975) dealt with arguments similar to those of Torch here. There the warrants had authorized the seizure of "documents pertaining to the interstate shipment of obscene materials." The court said that the defendant's reliance on *Marcus* and other cases

> holding improper warrants based on the conclusionary opinion of a police officer that books or films are "obscene," and requiring a prior independent judicial determination of the probable obscenity of particular items to

> be seized, is misplaced. Those cases seek to limit the discretion of the police to make ad hoc determinations of obscenity because such a procedure threatens to suppress protected material. The items named in this warrant were evidentiary materials, and their seizure did not threaten to deprive the public of access to protected material.

Id. at 567 n.3.

In contexts that do not involve First Amendment considerations, the test for the necessary particularity is a pragmatic one: "The degree of specificity required when describing the goods to be seized may necessarily vary according to the circumstances and type of items involved . . . [T]here is a practical margin of flexibility permitted by the constitutional requirement for particularity in the description of items to be seized." *United States v. Davis,* 542 F.2d 743, 745 (8th Cir. 1976).

Tested by this standard, we believe the warrants described with sufficient particularity the documents to be seized. The circumstances of the search and the nature of the things to be seized both served to limit the discretion of the officers who conducted the search. The area to be searched was Torch's person and the van he used to make deliveries. The documents to be seized were those related to the transactions Torch entered into during his brief trip into West Virginia.

It is true that, since Torch had been indicted immediately before the warrants issued, the warrants could have referred specifically to the five films named in the indictment. We are not convinced, however, that Torch's Fourth Amendment rights would have been

significantly better protected by requiring that the officers scour each document for some reference to those five films.

We believe that this case falls within the "practical margin of flexibility."

II.

Torch also argues that the district court erred in finding that he had no legitimate expectation of privacy in the Majestic warehouse and that he could not therefore challenge the introduction of evidence seized there.[1]

The rights guaranteed by the Fourth Amendment are personal, and may not be asserted vicariously. "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas v. Illinois,* 439 U.S. 128, 134 (1978). The test for whether a person may have evidence obtained in an unlawful search and seizure suppressed is whether the person had a "reasonable expectation of freedom from government intrusion" in the invaded place. *Mancusi v. DeForte,* 392 U.S. 364, 368 (1968).[2]

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[1] The parties discuss this issue as one of "standing." The Supreme Court, however, has recently rejected the use of that term in the analysis of this issue, *Rakas v. Illinois,* 439 U.S. 128 (1978), and we employ the *Rakas* analysis and terminology in deference.

[2] The Supreme Court in *Jones v. United States,* 362 U.S. 257 (1960) carved out an exception to this, the test "ordinarily" to be applied, where possession of the seized property is an element of the crime charged. This exception is inapplicable here, as possession is not an element of a violation of 18 U.S.C. §1465.

We must agree with the district court that the Majestic warehouse was no such sanctum for Torch. Torch was not present at the Pittsburgh warehouse when it was searched, but in West Virginia. He was employed by Majestic, but had no financial interest in Majestic nor in the warehouse. As a salesman for Majestic, Torch did from time to time use some portion of the warehouse, but there was no specific area set aside for his use. A desk that Torch occasionally used was not kept locked and all other employees had access to the same desk. The district court concluded that the "nature and character" of the warehouse was such that Torch would have no reasonable expectation of privacy there.[3]

Nor would any interest by Torch in the records seized create such an expectation of privacy. While some of the records were in Torch's handwriting, none were in his custody when seized. These records were kept during the normal course of Majestic's business by its employees for its benefit.

A person need not have exclusive use of an area to have a reasonable expectation of privacy there. *DeForte,* 392 U.S. 364. Occasional presence, however, without any right to exclude others, is not enough. *See Rakas,* 439 U.S. 128. Torch may not complain of the search of the Majestic warehouse.

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[3] The character of the invaded place is clearly important. In *Rakas,* 439 U.S. 128, the search was of an automobile, which the court noted has a lesser expectation of privacy associated with it. In *United States v. Britt,* 508 F.2d 1052 (5th Cir. 1975), the invaded place was a "storage area." The court held that there was no reasonable expectation of privacy, as there was no "demonstrated nexus between the area searched and the work space of the defendant." *Id.* at 1056.

III.

Torch also argues that there was not sufficient evidence to show that he had knowingly transported the five films across state lines. The test is whether the evidence, considered in the light most favorable to the government, was sufficient to permit the trier of fact to find guilt beyond a reasonable doubt. *United States v. Sherman,* 421 F.2d 198 (4th Cir. 1970) (per curiam). We believe the evidence meets this test.

There was evidence that Majestic operated an adult bookstore in Wheeling, West Virginia, but there was no evidence that Majestic operated a warehouse other than the one located in Pittsburgh. Two West Virginia dealers—one of them Holdren—testified to visiting the Majestic warehouse there. In addition, the records seized referred to it simply as "the warehouse."

Holdren testified that Torch telephoned him on February 11, 1977 and solicited an order that Torch was to deliver the following Monday, February 14. Telephone records produced at trial showed that a call had been made to Holdren on February 11 from the Pittsburgh warehouse, and an F.B.I. agent testified to having seen Torch and his van at the Majestic warehouse that day. Torch's entry in his "Salesman's Daily Report" for February 11 read: "Inventory and reload. Filled orders for Charleston trip." Copies of three of the five films the jury found obscene were seized at the Majestic warehouse, and documents seized there showed that a fourth had recently been in stock.

The test for sufficiency of the evidence is not defeated merely because other possibilities than that probative of guilt can be inferred from it. The evidence

that Torch transported the films in interstate commerce is concededly circumstantial, but we conclude that it was sufficient under the established test.

Finding no error in these or other points raised on appeal, we affirm the convictions.

AFFIRMED.

Memorandum Order of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

Criminal No. 77-20026
Criminal No. 77-20027
Entered 7/18/77

UNITED STATES OF AMERICA

vs.

RICHARD A. TORCH

MEMORANDUM ORDER

Defendant Richard A. Torch has moved to suppress evidence seized from his person and from a 1977 Dodge Kary van, Pennsylvania license CX13315, on February 16, 1977. After a hearing, and after careful consideration of the testimony given, evidence admitted, arguments made, and memoranda filed, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. United States Magistrate Paul J. Fourney issued two search warrants on February 16, 1977.

2. Both search warrants, one for the person of Richard A. Torch and one for the 1977 Dodge truck, Pen-

nsylvania License No. CX13315, contained the following language describing the property to be seized:

> "records, documents, and writings relating to the transportation, sale and distribution in interstate commerce of lewd, lascivious and filthy films, including route book, billing invoices, cash sale slips, credit memos, and other similar type documents, together with copies of lewd, lascivious, and filthy films and magazines, including a film labeled 'Dog Fucker'."

3. The above-quoted language orders seizure of two different kinds of property: (1) business records kept by Torch and Majestic News Company pertaining to the transportation of allegedly obscene materials; and (2) the allegedly obscene materials themselves.

4. The search warrants were issued on the basis of affidavits by FBI Special Agent Robert H. Sylvester.

5. Said affidavits state that certain films and magazines delivered by Torch to a reliable informant were viewed by Magistrate Fourney, who ruled that there was probably cause to believe that said films and magazines were obscene under the standards set forth by the United States Supreme Court in *Miller v. California,* 413 U.S. 15 (1973).

6. On the basis of the affidavits, there was probable cause to believe that Torch had, on his person and in the 1977 Dodge Kary van, business records pertaining to the interstate transportation of materials that had been adjudged obscene by Magistrate Fourney.

7. The affidavits, with the exception of statements concerning the film entitled "Dog Fucker", fail to describe in detail the contents of books, magazines, and films to be seized.

8. The affidavits contain conclusory and statutory language asserting that there is probable cause to believe that Torch was engaged in the interstate transportation of obscene materials.

9. Neither the affidavits, nor the search warrants, describe with particularity the items to be seized. Only one film, "Dog Fucker", is listed by title.

10. The officers executing the search and seizure, not Magistrate Fourney, had the responsibility of determining what items were "lewd, lascivious and filthy."

11. An adversary hearing pertaining to the obscenity of the materials to be seized was not conducted before the seizure, and defendant waived his right to such a hearing promptly after the seizure.

Conclusions of Law

1. The search warrant directed to the person of Richard A. Torch and authorizing the search for and seizure of business records pertaining to the interstate transportation of obscene materials was valid, and the search and seizure incident to said warrant did not violate defendant's Fourth Amendment rights.

2. The search warrant directed to the person of Richard A. Torch and authorizing the search for and seizure of "lewd, lascivious and filthy films and magazines" was constitutionally insufficient. *Heller v. New York*, 413 U.S. 483 (1973); *Roaden v. Kentucky,* 413

U.S. 496 (1973); *Lee Art Theatre v. Virginia,* 392 U.S. 636 (1968); *Marcus v. Search Warrant,* 367 U.S. 717 (1961); F. Schauer, *The Law of Obscenity,* 215-218 (1976). Accordingly, any allegedly obscene materials seized from Torch pursuant to said search and seizure may not be used as evidence against the defendant.

3. The search warrant directed to the 1977 Dodge Kary van and authorizing the search for and seizure of business records pertaining to the interstate transportation of obscene materials was valid, and the search and seizure incident to said warrant did not violate defendant's Fourth Amendment rights.

4. The search warrant directed to the 1977 Dodge Kary van and authorizing the search for and seizure of "lewd, lascivious and filthy films and magazines" was constitutionally insufficient. *Heller, supra; Roaden, supra; Lee Art Theatre, supra; Marcus, supra; Schauer, supra.* Accordingly, any allegedly obscene materials seized from said 1977 Dodge van pursuant to said search and seizure may not be used as evidence against the defendant.

5. Notwithstanding the foregoing, the search warrants directed to the person of Richard A. Torch and to the 1977 Dodge van for the search and seizure of a film entitled "Dog Fucker" are valid.

6. Even if the seizures of business records and allegedly obscene materials were massive, the seizures were for bona fide evidentiary purposes only and no prior adversary hearing concerning the obscenity issue was required. *Heller, supra.*

Accordingly, it is hereby ORDERED that defendant's Motion to Suppress be, and the same is, granted as to

those allegedly obscene materials seized from the person of Richard A. Torch and from the 1977 Dodge van pursuant to the search warrants; and

It is further ORDERED that defendant's Motion to Suppress be, and the same is, denied as to those business records pertaining to the interstate transportation of obscene materials and as to the film "Dog Fucker", seized, if at all, from the person of Richard A. Torch and from the 1977 Dodge van, pursuant to the search warrants.

ENTER:

DENNIS R. KNAPP
United States District Judge

Supreme Court, U. S.
FILED
APR 18 1980
MICHAEL RODAK, JR., CLERK

No. 79-1259

In the Supreme Court of the United States

OCTOBER TERM, 1979

RICHARD TORCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1259

RICHARD TORCH, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in refusing to suppress business records relating to his distribution of obscene materials, on the ground that a warrant authorizing seizure of these records was not sufficiently specific.

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted on five counts of interstate transportation of obscene motion picture films for

the purpose of sale and distribution, in violation of 18 U.S.C. 1465. He was sentenced to concurrent terms of three years' imprisonment on each count, with 30 months suspended in favor of probation. During the probationary period, petitioner will be required to perform services for an appropriate social organization one-half day per week. Petitioner was also fined $500. The court of appeals affirmed (Pet. App. A3-A12; 609 F.2d 1088).

1. The pertinent facts, as summarized by the court of appeals (Pet. App. A4-A5), are not in dispute. Petitioner was employed as a salesman for a Pittsburgh, Pennsylvania company engaged in supplying sexually explicit materials to retail outlets. On February 11, 1977, petitioner telephoned the owner of a retail outlet in Charleston, West Virginia to discuss a possible sale; the owner expressed an interest in purchasing a film entitled "Dog Fucker." Four days later, petitioner delivered to the outlet two cartons containing copies of that film as well as other sexually explicit magazines and films. The owner subsequently permitted an FBI agent to examine the contents of the cartons and to take copies of the magazines and films to a federal magistrate. The magistrate, after viewing certain of the magazines and films, determined that there was probable cause to believe they were obscene and issued warrants to search petitioner's person and his truck. The warrants authorized seizure of (Pet. App. A4-A5):

> records, documents, and writings related to the transportation, sale and distribution in interstate commerce of lewd, lascivious and filthy films, including route book, billing invoices, cash sales slips, credit memos, and other similar type documents, together with copies of lewd, lascivious, and filthy films and magazines, including a film labeled "Dog Fucker."

The warrants were executed the day they were issued, one day after petitioner had delivered the materials to the West Virginia outlet.

2. Petitioner moved to suppress the materials seized pursuant to the warrants. After an evidentiary hearing, the district court suppressed all of the magazines and films other than the film specifically named in the warrants, but declined to suppress that film and the business records (Pet. App. A13-A17). The court found that, except for the named film, the affidavits failed either to describe in sufficient detail the contents of the magazines and films to be seized, or to identify those items with particularity; the court believed that, as to these unidentified items, the warrants impermissibly left to the officers conducting the search the responsibility for determining which items in fact were obscene (*id.* at A15). The court also ruled, however, that the magistrate had properly found probable cause to believe that the magazines and films he viewed were obscene, and that petitioner had business records pertaining to the interstate transportation of those materials on his person and in his truck (*id.* at A14). On that basis, the court refused to suppress the records.

3. Petitioner contends (Pet. 6-10) that a warrant authorizing the seizure of business records relating to the interstate distribution of obscene materials must satisfy the same standards as a warrant for the obscene materials themselves. The court of appeals correctly rejected this contention in an opinion (Pet. App. A5-A9) on which we essentially rely.

The portion of the warrants authorizing seizure of the business records specified that the area to be searched was petitioner's person and truck, and that the items to be seized were "records, documents and writings * * *, including route book, billing invoices, cash sales slips, credit memos, and other similar type documents" relating to the distribution of obscene films. The courts below concluded (Pet. App. A6, A15) that greater particularity was required in the warrants' description of the obscene materials because those items were arguably communicative in nature and thus subject to special safeguards imposed by the First Amendment upon the seizure of books and other expressive materials that are in the process of distribution or exhibition. See *Roaden* v. *Kentucky*, 413 U.S. 496, 504 (1973). Because the seizure of "arguably protected" materials constitutes at least a minimal interference with their public circulation (see *Heller* v. *New York*, 413 U.S. 483, 493 (1973)), only those specifically identified expressive materials whose probable obscenity has previously been determined by a neutral magistrate may be seized; an ad hoc determination of which items are probably obscene and which are protected cannot be

left to the officer executing the warrant. See *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965); *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 325 (1979). These First Amendment considerations, however, do not apply to business records pertaining to allegedly obscene materials, since the seizure of such records in no way limits the public's access to the materials themselves. *United States* v. *Jacobs*, 513 F.2d 564, 567 n.3 (9th Cir. 1974). See *Stanford* v. *Texas*, *supra*, 379 U.S. at 485 n.16.

After viewing certain of the films that petitioner had delivered to the West Virginia store, the magistrate determined that there was probable cause to believe that the films were obscene and that petitioner had violated 18 U.S.C. 1465 by transporting the films in interstate commerce for the purpose of sale or distribution.[1] Under traditional Fourth Amendment standards, the warrants, which directed the search for and seizure of business records that constituted evidence of that crime, were adequate to enable the executing officers reliably to distinguish the documents to be seized. See *Andresen* v. *Maryland*, 427 U.S. 463, 479-482 (1976); *United States* v. *Cor-*

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[1] Because the magistrate made a determination of obscenity prior to issuing the warrants, it is irrelevant, insofar as the seizure of the business records is concerned, that the officer executing the warrants for records relating to the interstate transportation of "lewd, lascivious and filthy films" conceded at the suppression hearing that he did not know what the terms "lewd and lascivious" meant (Pet. 9).

tellesso, 601 F.2d 28, 33 (1st Cir. 1979), cert. denied, No. 79-724 (Feb. 19, 1980).

4. Petitioner argues (Pet. 10-12) that even if the business records and the one specified film were described with adequate particularity, the generalized description of the remaining films and magazines rendered the warrants—and hence the seizures—illegal in their entirety. His thesis is that the Fourth Amendment requirement of particularity was designed to prevent a general exploratory rummaging in a person's belongings, and that vindication of this purpose requires invalidating in its entirety a warrant that authorizes such a rummaging regardless of whether there is also language in the warrant authorizing a narrower search. We disagree.[2]

There is no reason to suppress items properly described in a warrant simply because other items were not described in sufficient detail. As several courts have recognized, the deterrent purpose of the exclusionary rule would not be served by requiring the suppression of items properly seized under the authority of a warrant on the ground that the seizure was part of the same search in which an illegal seizure occurred. See, *e.g.*, *United States* v. *Daniels*, 549 F.2d 665, 668 (9th Cir. 1977); *United States* v. *Mendoza*, 473 F.2d 692, 697 (5th Cir. 1972). Petitioner's argument for wholesale suppression in this

[2] We also note that petitioner did not raise this claim below, and, accordingly, absent exceptional circumstances, he should not be permitted to do so for the first time in this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

case has even less to commend it than the argument rejected in *Franks* v. *Delaware*, 438 U.S. 154, 171-172 (1978), where this Court held that the inclusion of deliberately false statements in an affidavit supporting a search warrant would not invalidate the entire affidavit if it were otherwise sufficient.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1980

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